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Criminal Proceedings Against Albers

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Italian Court of Cassation—war crimes—sovereign immunity—acta jure imperii—application of decisions of the International Court of Justice

CRIMINAL PROCEEDINGS AGAINST ALBERS. No. 32139. 95 Rivista di diritto internazionale 1196 (2012).

Corte di cassazione, August 9, 2012.

In August 2012, the First Criminal Division of the Court of Cassation (Supreme Court or Court), the highest Italian domestic court, issued a judgment upholding Germany's sovereign immunity from civil claims brought by Italian war crime victims against Paul Albers and eight others in the Italian courts (*Albers*).¹ In so doing, the Court overruled its own earlier decisions and also reversed the judgment of April 20, 2011, by the Italian Military Court of Appeal (Military Court), which had upheld such claims relating to war crimes committed by German forces in Italy during World War II. With this ruling, the Court of Cassation put an end to its decade-long effort to find an exception to the well-known rule of customary international law providing for sovereign immunity from foreign civil jurisdiction for acts *jure imperii*. This *revirement* resulted from the Court's decision to give effect to the judgment of the International Court of Justice (ICJ) in *Germany v. Italy*.²

In *Albers*, the Court reviewed the Military Court's 2011 decision upholding a first-instance conviction of five of the accused—German citizens who were former members of the Schutzstaffel (SS)—for war crimes and crimes against humanity perpetrated in Italy during the final months of World War II. Germany had challenged the damages-related section of the *dispositif* of that decision (the reparation order). The Military Court dismissed Germany's objection to the exercise of civil jurisdiction, relying on the reasoning of the Supreme Court's 2004 judgment in the *Ferrini* case.³

In that earlier case, the Court of Cassation had decided that the principle of state immunity for acts *jure imperii* did not apply to claims for damages arising from war crimes. It had concluded that the *jus cogens* nature of the prohibition of international crimes prevailed over the customary international law rule of sovereign immunity. According to the Court, the paramount interest in preventing the most atrocious crimes necessarily trumps the concern of preserving state sovereignty through immunity. Moreover, since most of the crimes in question had taken place in Italy, the domestic tort exception applied. Under that doctrine, the non-contractual tortious or delictual conduct of a state occurring in another state's territory is subject to the jurisdiction of the latter's domestic courts.⁴ As later recalled in *Albers*, this judgment was based on a fortunate (and alleged) "convergence of the criteria based on the nonderogable nature of *jus cogens* and on the so-called *tort exception* principle" (p. 1198).

¹ Criminal Proceedings Against Albers, Cass., sez. un. pen., 9 agosto 2012, n. 32139, 95 RIVISTA DI DIRITTO INTERNAZIONALE [RDI] 1196 (2012), INT'L L. DOMESTIC CTS. [ILDC] 1921 (in Ital.). All citations to the judgment in this report are to the version in *RDI*. Translations of this and other Italian cases herein are by the author unless otherwise noted.

² Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening) (Int'l Ct. Justice Feb. 3, 2012), at <http://icj-cij.org> [hereinafter *Germany v. Italy*] (reported by Alexander Orakhelashvili at 106 AJIL 609 (2012)).

³ *Ferrini v. Repubblica federale di Germania*, Cass., sez. un., 11 marzo 2004, n. 5044, 87 RDI 539 (2004), *translated in* 128 ILR 658 (reported by Andrea Bianchi at 99 AJIL 242 (2005)).

⁴ See, e.g., United Nations Convention on Jurisdictional Immunities of States and Their Property, GA Res. 59/38, annex, Art. 12 (Dec. 2, 2004).

Ferrini was followed and applied by the Court of Cassation in several subsequent decisions. In 2008, for example, it confirmed the power of lower Italian courts to exercise civil jurisdiction against Germany in similar cases,⁵ on the grounds that it would be unreasonable to disallow jurisdiction over the commission of those crimes which “mark the breaking point of the tolerable exercise of state sovereignty” (p. 1202).⁶ It noted “that [its decision] would contribute to the *emergence* of a rule shaping the immunity of foreign states. Such a rule, in any event, is *already* embedded in the international legal order” (*id.*).⁷ In a subsequent decision, *Milde*, the Court went so far as to deviate expressly from the traditional method of inferring custom from a record of widespread state practice.⁸ It held that a “qualitative” assessment is at times preferable to an “arithmetical calculation,”⁹ in light of the difficulty inherent in verifying both the existence of certain customs and their hierarchical position within the system of principles generally accepted by the international community.

Finally, in 2011, the Court of Cassation upheld the Florence Court of Appeal’s decision authorizing the enforcement of a Greek tribunal’s ruling against Germany.¹⁰ In the judgment submitted to the Court of Appeal for *exequatur*, the Tribunal of Leivadia had ordered Germany to pay compensation for war crimes to private individuals. Germany argued that the enforcement of this judgment was precluded under the relevant safeguards in Italian and European Union private international law prohibiting recognition of foreign judgments contrary to *ordre public*.¹¹ Germany also noted that foreign jurisdictions had not endorsed the *Ferrini* approach. The Court of Cassation responded that foreign decisions did not contravene *Ferrini*, at least inasmuch as the territorial link (*locus commissi delicti*) was used to assert jurisdiction. It then offered a lofty panegyric on how international law had evolved since World War II, strenuously supporting the rule in *Ferrini* with a handful of diverse precedents, and rejected Germany’s appeal: “Such a rule is *already implicit* in the international legal system, which elevates the protection of inviolable human rights—on account of its axiological nature as a ‘meta-value’—to the level of a fundamental principle, *to whose emergence* the *Ferrini* judgment makes a self-conscious contribution.”¹²

In its 2011 *Albers* decision, the Military Court adhered to the core arguments of the Court of Cassation’s earlier decisions. Additionally, it expanded on the assumptions that customary

⁵ Cass., sez. un., 29 maggio 2008, n. 14199 (judgment); Cass., sez. un., 29 maggio 2008, nn. 14200–12 (13 orders).

⁶ Quoting *Repubblica federale di Germania v. Mantelli*, Cass., sez. un., 29 maggio 2008, n. 14201, ILDC 1037, para. 11 (emphasis added) (in Ital.), *quoted in* Carlo Focarelli, Case Report: Federal Republic of Germany v. Giovanni Mantelli and Others, 103 AJIL 122, 125 (2009).

⁷ Quoting *Mantelli*, ILDC 1037, para. 11, *quoted in* Focarelli at 125.

⁸ Criminal Proceedings Against Milde, Cass., I sez. pen., 13 gennaio 2009, n. 1072, 92 RDI 618 (2009), ILDC 1224 (in Ital.); *cf.* *United States v. Tissino*, Cass., sez. un., 25 febbraio 2009, n. 4461, ILDC 1262 (in Ital.); *Lozano v. Italy*, Cass., I sez. pen., 24 luglio 2008, n. 31171, para. 7, ILDC 1085 (in Ital.; partial Eng. trans.); *Tigri Tamil*, Trib. Napoli, 29 gennaio 2012, at <http://www.penalecontemporaneo.it/upload/Sentenza%20Guardiano%20Tigri%20Tamil.pdf> (all excluding application of *Ferrini* principle to acts that do not amount to international crimes or crimes against humanity).

⁹ *Milde*, para. 4.

¹⁰ *Repubblica federale di Germania v. Prefettura Autonoma di Vojotia*, Cass., I sez. civ., 20 maggio 2011, n. 11163, *translated in* ILDC 1815.

¹¹ Legge 31 maggio 1995, n. 218, Art. 64(1)(g); EC Regulation No. 44/2001, Art. 34(1), 2001 O.J. (L 12) 1, 10.

¹² *Prefettura Autonoma di Vojotia*, ILDC 1815, para. 30 (emphasis added).

international law is evolutionary and that a balance must be struck between sovereign immunity and the need to indemnify the victims of the gravest crimes. Giving preference to the prohibition against international crimes (as *lex superior*) also furthered the progressive development of customary international law, shaping a new exception (as *lex specialis*).

In February 2012, however, shortly before the Court of Cassation issued its *Albers* decision, the ICJ delivered its judgment in *Germany v. Italy*. In that case, Italy had based its arguments on the reasoning of the *Ferrini*-inspired case law: implementation of the peremptory rules against international crimes cannot be frustrated by state immunity, especially when the crimes took place within the territory of the forum state. The ICJ rejected this defense and found Italy in breach of international law for retaining claims against Germany in national courts and for authorizing enforcement of Greek judgments violating Germany's immunity. The ICJ held, in short, that no territorial exception grants derogation from immunity on the basis of *locus commissi delicti*; no evidence derived from general state practice and *opinio juris* indicates that a new exception to customary law has emerged in that regard; the grant of immunity is independent of the gravity of the wrongful act, even when *jus cogens* is breached; and because immunity operates at a procedural level and the prohibition of international crimes is a substantive rule, a normative conflict between them cannot occur and all attempts to wield the *lex superior* argument are misplaced.

Faced with the ICJ's ruling, the Court of Cassation in *Albers* took due note of the dismissal of Italy's defense, which in effect demolished the pillars of the *Ferrini* case law. Nevertheless, it contested some points of the ruling, in obiter dicta (p. 1204). Among them was the ICJ's statement that, in invoking *jus cogens*, Italy had allegedly overlooked that

[t]he rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful.¹³

But according to the Italian Court, "It appears unduly restrictive to confine *jus cogens* rules within their substantive scope, disregarding the fact that their practical *effectiveness* depends precisely on the legal consequences of the violation of peremptory norms" (*id.*).

The Court also noted that the distinction between substantive rules of *jus cogens* and procedural rules on immunity as on two different levels promotes impunity, and fitting international crimes in the *jure imperii* category provides them with undeserved protection. Nonetheless, the *Albers* Court acknowledged the binding force of the ICJ's decisions and the lack of international support for its own conclusions. It accepted the ICJ's clear message that no wrongdoing by a state—no matter how grave—can erode its immunity. All the same, the Court observed that the ICJ's ruling, rather than representing a "highly plausible legal solution," commanded compliance because of its inherent authority as a "*dictum* of the international Judge" (pp. 1204–05). This remark, implicitly equating the ICJ's judgment to a legal source, formed the premise of a predictable distinction: the World Court's decision must be respected because it shapes the law (*jus*), even if it does not reflect what is just (*justum*): "[I]t is not possible to find in the ICJ's decision any arguments capable of refuting the persuasiveness

¹³ *Germany v. Italy*, *supra* note 2, para. 93.

and legal solidity of the principles thus far affirmed by this Court" (p. 1205). The only acceptable reason to surrender the *Ferrini* case law was, thus, the lack of "validation" by the international Community of which the ICJ is the highest judicial body" (*id.*). Ultimately, the Court acknowledged that its position was not ("yet") shared by other states to a sufficient degree, "and this ineluctable conclusion prevent[ed] further application [of the *Ferrini* principles]" (*id.*).

The Court of Cassation further observed that Italy had incurred international responsibility for acts of its judiciary (the assertion of jurisdiction and concession of *exequatur*) and had been ordered to restore the status quo ante. That order demanded compliance irrespective of the means chosen to implement it and notwithstanding the legal finality of the domestic judgments already delivered. Formally, the ICJ's decision did not impose obligations directly on the Italian Court, which, it argued, as a matter of domestic law enjoyed "total autonomy of the jurisdictional function" (p. 1205). However, to avoid undermining Italy's international position, it resolved to implement the ICJ's ruling and to issue a judgment reflecting the current state of international law.

Therefore, the Court of Cassation overturned the Military Court's decision for lack of jurisdiction, and barred its remand. It also added a cursory remark excluding the possibility that such a ruling would create an issue of constitutionality. This last passage is discussed below.

* * * *

In *Albers*, the Italian Court conceded defeat, recognizing that the ICJ's judgment commanded respect and that the courts of other countries had not followed its lead, which strengthens the ICJ's conclusion that no new custom had crystallized, before or after *Ferrini*. Nonetheless, the Court took pains to claim (a symbolic) victory in terms of justice, casting itself as the unappreciated genius. It is fair to say that this exercise of rationalization, slightly pathetic at first glance, was necessary to make a strategic point: that the new rule of customary international law it favors has not yet emerged but could do so in the future. In asserting the validity of the values of justice informing the supposed custom, the Court carefully kept that hope alive and denied that the evolutive process leading to the new rule had failed.

Even before the Court's ruling in *Albers*, the ripples caused in the Italian judiciary's pond by the stone of the ICJ's judgment had reached some lower courts. Specifically, proceedings pending before the Tribunal of Florence and the Turin Court of Appeal had required them to determine the impact of the ICJ's decision in situations similar to those in *Ferrini* and *Albers*.¹⁴ In both proceedings, a preliminary order had been obtained from the Court of Cassation en banc, precisely on the possibility of exercising jurisdiction over Germany, as had been authorized by the Court. This order posed a problem. On the one hand, issues settled by the Court's preliminary orders cannot be further disputed in the main proceedings. On the other, Article 94(1) of the United Nations Charter enjoins all UN members to comply with the ICJ's judgments, and that obligation enjoys quasi-constitutional status under Article 11 of the Italian Constitution. The Florence tribunal acknowledged the superior rank of the Charter article and accordingly set aside the norms on the finality of the Supreme Court's rulings and asserted its lack of jurisdiction. The Turin Court of Appeal reached a similar conclusion by different reasoning. It noted that the ICJ's decision could not overrule the Court of Cassation's preliminary

¹⁴ *Manfredi v. Repubblica federale di Germania*, Trib. Firenze, 28 marzo 2012, 95 RDI 583 (2012); *Repubblica federale di Germania v. De Guglielmo*, App. Torino, 3 maggio 2012, *id.* at 916.

pronouncement on jurisdiction, which was final and binding in the instant proceedings. Yet the ICJ's ruling had to be taken into account when "assessing *the merits* of the dispute."¹⁵ Hence, it dismissed the claim on grounds of admissibility.

Both judgments illustrate how internal *res judicata* might be creatively overruled to give effect to the ICJ's decisions. But the need for such creative arguments was recently removed by the legislature, which introduced a new norm into the Code of Civil Procedure that envisages conflicts with an ICJ decision as a permissible ground for revocation of final judgments.¹⁶ Incidentally, a similar legislative solution had been adopted in the criminal field, after the European Court of Human Rights repeatedly condemned Italy for not allowing the reopening of criminal trials conducted in violation of due process standards. Initially, the Court of Cassation was forced to stretch analogic interpretation so as to apply the existing rules on revision if a judgment from Strasbourg ruled that the trial had been conducted in violation of the European Convention on Human Rights.¹⁷ The legislature later introduced a new ground for reopening such a case when it had concluded with a sentence by the Court of Cassation.¹⁸

Moreover, the combined effect of the international rule—as identified by the ICJ—and Article 10 of the Constitution, which calls for the automatic conformity of the Italian legal order with international custom, requires judges to refuse recognition of foreign judgments violating state immunity. The cooperative stance displayed in *Albers* and by the Italian legislator does justice to the ICJ's rejection of Germany's request for a nonrepetition order against Italy.¹⁹

At least on the surface, the Court of Cassation appeared to take the ICJ's judgment seriously. Alexander Orakhelashvili concluded his critique of the ICJ's decision in this *Journal* by observing that "[w]hether Italian authorities comply is for them to choose, but whether they are obligated to do so is questionable."²⁰ They have in fact complied, and the Court seemingly felt an obligation to do so—though it may have derived from a sense of Italy's treaty obligations rather than from any notion of judicial duties owed to the World Court as a superior body. The Italian Court did not attempt to shield itself behind the doctrine according to which states are unitary subjects ("black-boxes")²¹ whose inner components are irrelevant to (and immune from) the obligations owed by the state under international law.

After all, the ICJ itself ordered Italy as a state to "ensure that the decisions of its courts and those of other judicial authorities infringing [Germany's immunity] cease to have effect,"²² and to redress all violations that had already occurred. This passage must be read in conjunction with the statement that Italy would not escape its obligation simply because "some of the

¹⁵ *De Guglielmo* at 921 (emphasis added).

¹⁶ Legge 14 gennaio 2013, n. 5, Art. 3(2) (ratifying United Nations Convention on the Jurisdictional Immunities of States and Their Property, *supra* note 4).

¹⁷ See Somogyi, Cass., I sez. pen., 3 ottobre 2006, n. 32678; Cat Berro, Cass., V sez. pen., 2 febbraio 2007, n. 4395; Somogyi v. Italy, 2004-IV Eur. Ct. H.R. 77.

¹⁸ See Art. 625 *bis* CODICE DI PROCEDURA PENALE. It will be applicable to those criminal proceedings, like *Albers* and *Milde*, where the victims were admitted to bring a civil claim.

¹⁹ Germany v. Italy, *supra* note 2, para. 138.

²⁰ Orakhelashvili, *supra* note 2, at 616.

²¹ Ward Ferdinandusse, *Out of the Black-Box? The International Obligation of State Organs*, 29 BROOK. J. INT'L L. 45 (2003).

²² Germany v. Italy, para. 139(4).

violations may have been committed by judicial organs, and some of the legal decisions in question have become final in Italian domestic law.”²³ In other words, Italy must ensure that domestic courts reverse and discontinue, respectively, past and pending violations.²⁴

Quite apart from the question whether all ICJ judgments can be considered directly applicable in domestic courts (that is, are “self-executing”), this particular one clearly is because of its clarity and completeness. Of course, Italy enjoys a certain “margin” in choosing the specific means to implement its international obligations. But in *Albers*, the Court of Cassation accepted its responsibility and declared its intent to contribute to Italy’s record as a law-abiding citizen of the international community even before the legislator’s intervention. Granted, insofar as the Court decided to follow the ICJ out of a sense of “comity” rather than obligation, the moderate monism emanating from *Albers* might easily revert to dualism, without notice.²⁵ But it is more likely that the *Albers* Court used the comity language to save face, not to reserve a right to rebel. Furthermore, the legislator’s move dispelled all doubts about the genuineness of Italy’s surrender.

A certain parallel can be drawn with the *Avena* saga in the United States. The reluctance of the U.S. Supreme Court to accept the decisions of the ICJ as binding despite the willingness of the executive branch pushed the ICJ to address the U.S. courts directly, to avoid any doubts as to which organs, *within the state*, were responsible for implementation. As Steve Charnovitz showed, however, neither the federal nor the state courts accepted an obligation to ensure compliance with the ICJ’s decisions in the absence of revision of state or federal legislation, and neither the U.S. Congress nor the federal executive has acted purposefully to implement the ICJ’s decisions.²⁶ Charnovitz’s view of the U.S. Supreme Court in this regard highlights the gulf between it and the Italian Court of Cassation: “Instead of assuring that U.S. treaty commitments are adhered to, the U.S. Supreme Court has glorified the supremacy of state laws vis-à-vis international obligations of the United States.”²⁷

In the *Russel* case of 1979, the Italian Constitutional Court rejected a challenge to the constitutionality of the statute giving effect to Article 31(1) and (3) of the Vienna Convention on Diplomatic Relations.²⁸ It noted the customary nature of the rules on diplomatic immunity, which had taken effect before the Constitution, and thus dispelled any doubts about their constitutionality. The Constitutional Court also argued that these customs were necessary “to ensure the fulfillment of the diplomatic mission, an essential institution of international law,” but warned that, “as regards international norms enjoying general recognition that entered into force after the Constitution, the mechanism of automatic incorporation . . . cannot in any way permit breach of the fundamental principles of our constitutional order.”²⁹ This passage clarifies that post-1948 customs cannot conflict with the so-called counterlimits, which function

²³ *Id.*, para. 137.

²⁴ See Mirko Sossai, *Are Italian Courts Directly Bound to Give Effect to the Jurisdictional Immunities Judgment?*, 21 IT. Y.B. INT’L L. 175, 178–79 (2011).

²⁵ See Francesco Francioni, *From Utopia to Disenchantment: The Ill Fate of ‘Moderate Monism’ in the ICJ Judgment on the Jurisdictional Immunities of the State*, 23 EUR. J. INT’L L. 1125, 1129 (2012).

²⁶ See Steve Charnovitz, *Correcting America’s Continuing Failure to Comply with the Avena Judgment*, 106 AJIL 572, 574 (2012).

²⁷ *Id.* at 573.

²⁸ Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 UST 3227, 500 UNTS 95.

²⁹ Corte cost., 18 giugno 1979, n. 48 (final para.), *Gazzetta Ufficiale* 1979, n. 175, available at <http://www.cortecostituzionale.it>.

as a barrier to the surrender of sovereign powers to (or their exercise by) supranational and international bodies.

In *Albers*, the Court of Cassation opined that, since the custom envisaged in *Ferrini* does not in fact exist, no issue of constitutionality can arise (pp. 1205–06). This passage is elliptical, as it fails to specify which statutory act was suspected of breaching the alleged custom. Perhaps it refers to a conflict between the statutes enjoining Italian courts to decline jurisdiction³⁰ and the *Ferrini* principle, elevated to a constitutional standard under Article 10 of the Constitution. Perhaps the Court was referring to another—more radical—conflict adumbrated by the plaintiffs, between immunity and constitutional counterlimits. If international *jus cogens* cannot trump sovereign immunity, one could try to invoke *domestic* peremptory safeguards to escape compliance with detestable international obligations, as in the *Kadi* case.³¹ As seen above in *Russel*, however, pre-Constitution customs—including those on immunity—are seemingly grandfathered into the Italian system and cannot undergo constitutional scrutiny, not even for breach of the counterlimits. Cases are pending before the Court of Cassation that deal exactly with this issue, which will grant an extra day (or year) in court to the *Ferrini* saga.³²

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Sovereign immunity—provisional attachment of noncommercial property of a state—2004 UN Convention on Jurisdictional Immunities of States and Their Property—customary international law

NML CAPITAL LTD. v. REPUBLIC OF ARGENTINA. Nos. 11-10.450, 11-13.323, 10-25.938. At http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/. French Cour de cassation, March 28, 2013.

In three cases decided on the same day, the French Court of Cassation held that the provisional attachments of funds belonging to the Republic of Argentina by NML Capital Ltd. (NML) were void on the ground of sovereign immunity from enforcement because the funds were intended to finance state noncommercial activities and had not been subject to an express waiver of immunity by Argentina.¹ These cases are the first judicial application by the Court of Cassation of the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property (2004 UN Convention), which France signed on January 17, 2007, and ratified on June 28, 2011.²

³⁰ See L. n. 218/1995, *supra* note 11, Art. 11.

³¹ Joined Cases C-402/05 P & C-415/05 P, *Kadi* v. Council, 2008 ECR I-6351 (reported by Miša Zgorec-Rožej at 103 AJIL 305 (2009)).

³² Nn. 17962/2011 (L. Ferrini and heirs) and 12021/12 (O. Ferrini and heirs), *cited in* Giuseppe Cataldi, *The Implementation of Germany v. Italy*, 2 ESIL REFLECTIONS, Jan. 24, 2013, at <http://www.esil-sedi.eu/node/281>.

¹ NML Capital Ltd. v. Republic of Arg., Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Mar. 28, 2013, at http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/ (to be reported in the *Bulletin d'information de la Cour de cassation*). Translations from the French are by the authors.

² Loi 2011-734 du 28 juin 2011 autorisant la ratification de la convention des Nations unies sur les immunités juridictionnelles des États et de leurs biens, J.O., June 29, 2011, p. 10953. For the 2004 UN Convention, see GA Res. 59/38, annex (Dec. 2, 2004) (not yet in force).